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Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

FLOYCE REED PEYTON,

Petitioner,

v.

FRED'S STORES OF ARKANSAS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a leave of absence may be considered a "reasonable accommodation" which would enable an employee to perform essential functions of the employment position under the Americans with Disabilities Act, although the employee was incapable of attending work at the time of termination.

2. Whether an employer satisfies, as a matter of law, the requirement of participating in an "interactive process" to determine and provide a reasonable accommodation to a disabled employee under the Americans With Disabilities Act when the employer asks the employee what accommodation it can provide while the employee is under sedation and recovering in a hospital after surgery, and the employee could not yet determine exactly how long she would be unable to work.

3. Whether the Eighth Circuit erred in affirming summary judgment by ruling the employee was unable to perform the essential functions of her job with reasonable accommodation by the employer while the employee was in a hospital two days following surgery for cancer, under medication, and without the opportunity to consult with a physician.

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INTRODUCTION

The Eighth Circuit denied the Petitioner, Floyce Peyton, rights under the Americans with Disabilities Act of 1990 ("ADA") in its decision of this case. In doing so, the District Court and the Eighth Circuit have isolated and excluded many of the people the Act was meant to protect. Petitioner requests the Court grant certiorari to restore those rights -- not only to the Petitioner, but to all others who may be hospitalized or recuperating from a disability – and resolve a split in the circuits on the issue involved in this case.

The decisions below deny the protection of the ADA to a disabled woman because she was unable to leave her hospital bed immediately after she underwent surgery for ovarian cancer. Since she was unable to physically attend work at the time Fred's fired her (while she was heavily medicated and recovering in her hospital bed), the Eighth Circuit declared she could not be a "qualified individual" able to perform the essential functions of her job with a "reasonable accommodation."

So ruling, the Eighth Circuit has misinterpreted the meanings of "reasonable accommodation" and "qualified individual" under the ADA. A temporary medical leave is a reasonable accommodation that will allow a disabled person to perform the essential functions of her job, and that many disabled people must be granted by their employers to

remain healthy and productive individuals. The failure to grant such a leave in many cases, as recognized by several other circuits, is discriminatory.

At least 10 circuits have addressed this question, and those circuits are equally divided, deciding this question in two distinct and squarely conflicting ways. This Court should grant certiorari to resolve the split among the circuits and restore the rights of disabled people in the United States.

OPINIONS BELOW

The orders and judgment of the United States District Court for the Eastern District of Arkansas (per Miller, J.) granting the Defendant's motion for summary judgment are reprinted at App. 11-20, and are not otherwise published. The Eighth Circuit's decision (per Limbaugh, J., joined by Murphy and Smith, JJ.) affirming the district court is reprinted at App. 1-10, and is published at 561 F.3d 900.

JURISDICTION

The Eighth Circuit filed its decision on April 15, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). Petitioner's claim is based on 42 U.S.C. §12101 *et seq*. Jurisdiction in the district court was proper based upon 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Americans with Disabilities Act of 1990 42 U.S.C. §12101 *et seq.* (current version as amended in 2008 at 42 U.S.C.A. § 12101 *et seq.*)

All pertinent parts of the ADA are reprinted at App. 21-23.

STATEMENT OF THE CASE

I. Factual Background

This is a case brought under the Americans With Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*

Title I of the ADA bars employers from discriminating against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA further defines "discrimination" to include:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue

> hardship on the operation of the business of such covered entity ....

Id. § 12112(b)(5)(A).

As the statutory language indicates, ADA protection extends to a "qualified individual with a disability," namely, "an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphasis added).

On December 5, 2005, the Petitioner, Floyce Peyton ("Peyton"), with some 27 years of experience as a retail store manager, was hired by the Respondent, Fred's Stores of Arkansas, Inc. ("Fred's") for the position of manager of its Heber Springs, Arkansas store. Prior to Peyton's hiring, the position had been vacant for six months. During the remainder of December, 2005, and early January, 2006, Peyton was given a management training course by Fred's, and on Friday, January 6, 2006, Peyton assumed the position of the Heber Springs store manager, working on that Friday and Saturday, January 6 and 7.

On Monday, January 9, Peyton experienced severe pain in her abdomen, causing her to consult with a physician, Dr. Kristy Cowherd, in Heber Springs. After conducting an examination of Peyton, including an ultrasound diagnostic test, Dr. Cowherd rendered a preliminary diagnosis of cervical cancer, and immediately referred her

to the University of Arkansas Medical Center in Little Rock. On the same day, Peyton told the assistant manager at Fred's Heber Springs store that she would be hospitalized, and Peyton's fiancé delivered a note signed by Dr. Cowherd to the assistant manager stating "Floyce Peyton needs to be off work at least 1/9/06. Return date unknown." Peyton underwent surgery for the cancer on January 12. Between that date to and including January 14, Ms. Michelle Mitchell, manager of the Fred's region that included the Heber Springs store, called Peyton twice at the hospital. In the first call (the exact date of which is not clear from the record), Mitchell testified that she asked her how she was doing, and "on the accommodation part, 'How can we accommodating [sic] you?'" Peyton was under the influence of pain medication, and advised Mitchell that she didn't know how long she would be out. Peyton does not recall any discussion of accommodation.

Mitchell became alarmed at this discussion, and called her supervisor, Barry Maxwell, Fred's regional vice-president; complained about the situation at her store; and asked him what they should do. Following a discussion between them, and Maxwell's obtaining approval from an unknown authority at Fred's, they agreed to terminate Peyton. Mitchell then called Peyton again, on January 14 – two days after the surgery – and fired Peyton. No other representative of Fred's talked with Peyton prior to her firing by Mitchell.

There is no evidence that there was any kind of dialogue between Peyton and Mitchell or any other representative of Fred's regarding any reasonable accommodation for Peyton to maintain her job, other than the cryptic comment about "How can we accommodating [sic] you?" testified to by Mitchell but that was not recalled by Peyton. Before the firing, Peyton was never given a reasonable opportunity to request any accommodation.

After firing Peyton, Fred's installed the then-assistant manager of the Heber Springs store as manager. Peyton subsequently underwent approximately six months of chemotherapy, but was given a limited release for work by her physician in March, 2006. After completing the treatment, Peyton was thereafter physically able to perform the duties that she had been required to perform as manager of Fred's store. However, she alleges that because of the firing, she was forced to undergo mental stress and anxiety; was required to file bankruptcy; lost her car; and was subsequently divorced due in part to the financial stress to which she was subjected.

Fred's is a regional chain with approximately 650 stores, of which approximately 70 to 80 are in Arkansas. Fred's employs approximately 70 to 80 managers in Arkansas, and fewer assistant managers.

II. Procedural History

Petitioner first filed a charge with the U.S. Equal Employment Opportunity Commission, which issued a Notice of Suit Rights letter to the Petitioner on October 26, 2006.

Suit was filed in the U.S. District Court for the Eastern District of Arkansas on January 22, 2007. After discovery, Fred's filed a Motion for Summary Judgment on April 2, 2008. On May 19, 2008, the District Judge filed an Order granting the Motion and a Judgment dismissing the case with prejudice. App. at 11.

In its opinion, the District Court concentrated on the fact that Peyton was unable to attend work at the time Fred's fired her. "An employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones." App. at 17 (citations omitted). In reaching this conclusion, the Court relied on *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1995), a case where the Fifth Circuit ruled an individual who was unable to attend work because he was recovering from ankle surgery could not possibly be a "qualified individual" under the ADA because he could not attend work on the date of termination. This logic forbids courts' allowance of medical leave as a reasonable accommodation under the ADA.

On appeal from the District Court's Order granting Fred's Motion for Summary Judgment, a three-judge panel of the Eighth Circuit affirmed the decision of the District

Court, by opinion dated April 15, 2009. In that opinion, the Eighth Circuit refused to consider a temporary medical leave as a reasonable accommodation discussion, saying:

> Despite the unfortunate circumstances of plaintiff's illness, the ADA does not provide for recovery against her employer. As noted, it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable accommodation, cannot, as a matter of law, be considered "otherwise qualified" under the ADA. That is the case here. Although plaintiff was given a limited release to seek employment in March of 2006, she concedes that her illness and treatment prevented her from performing the duties as defendant's store manager during the six months of chemotherapy.

App. at 8-9. In coming to this conclusion, the Court cited *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998), a case where the Seventh Circuit ruled a teacher with various medical problems could not be classified as a "qualified individual" because he was unable to attend work when the school fired him. "Obviously, an employee who does not come to work cannot perform the essential functions of his job." *Id.* at 1003. This rule squarely conflicts with the holdings of other circuits, as will be examined in the next section. The Eighth Circuit also cited two other cases in

conflict with the holdings of other circuits. *See Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question"), and *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) ("Plaintiff had not even been released to work at the time he was terminated. (citation omitted) As he concedes, at the time of his termination, Plaintiff was not 'otherwise qualified' for *any* position with Defendant" (italics in original)).

The Eighth Circuit also addressed Fred's requirement to participate in an "interactive process" to determine what reasonable accommodation could be provided to the disabled employee. The Court found that a single query made over the telephone by Fred's regional manager to the Petitioner, who was still heavily medicated in her hospital bed just two days after surgery, satisfied Fred's requirement. The Eighth Circuit reasoned that the Plaintiff's answer that she could not yet determine what accommodation she needed (her doctor had not yet told her what further treatment would proceed), amounted to a request for an indefinite leave of absence that Fred's should not be expected to grant.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit refused to recognize important rights granted to disabled people by

the ADA in its decision of this case – rights recognized and upheld by other circuits deciding the same question. The Eighth Circuit erroneously decided the case by ruling that a disabled person temporarily unable to attend work was not a "qualified individual" able to perform the essential duties of her job with a "reasonable accommodation" under the ADA. The Court refused to take into account that a temporary medical leave may be a "reasonable accommodation," which would classify the Petitioner as a "qualified individual" worthy of protection under the statute. The Court should grant certiorari to reverse the decision of the Eighth Circuit, and resolve the circuit split regarding the questions presented.

I. THE EIGHTH CIRCUIT ERRED IN DECIDING AN IMPORTANT CASE CONCERNING THE RIGHTS OF DISABLED PEOPLE.

A. Petitioner Qualified for Protection Under the ADA Because She Could Perform the Essential Duties of Her Job with Reasonable Accommodation of Temporary Medical Leave.

The Eighth Circuit erred by finding Petitioner was not a "qualified individual" under the ADA. At the time of her termination, she was capable of performing the essential duties of her job with the "reasonable accommodation" of a temporary medical leave. The Eighth Circuit erroneously

ruled that the leave of absence Petitioner's disability called for could not, as a matter of law, be categorized as a "reasonable accommodation" under the ADA. The Eighth Circuit should have reversed the decision of the district court, and remanded proceedings to perform an individualized inquiry of the facts as to whether such accommodation placed "undue hardship" on the employer.

The ADA protects against discrimination in hiring, advancement, or discharge of a "qualified individual with a disability," namely, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

This Court prescribed the test of who is a "qualified individual" in *School Bd. v. Arline*, 480 U.S. 273 (1987), where the issue was whether a schoolteacher with tuberculosis was an "otherwise qualified individual" under the Rehabilitation Act of 1973[1]. This Court stated: "The district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if

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[1] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits federally funded programs from discriminating against a handicapped person because of the handicap. *Arline*, 480 U.S. at 275. "Courts have universally looked to Rehabilitation Act cases as a source of guidance when construing the ADA." *McKay v. Toyota Motor Mfg. U.S.A. Inc.*, 110 F.3d 369, 373 (6th Cir. 1997)(citation omitted).

§ 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear." *Id.* at 287.

By affirming summary judgment in this case, the Eighth Circuit denied any opportunity to examine the unique facts of this situation, and embraced a *per se* rule forbidding leaves of absence as a reasonable accommodation. The Court stated:

> Despite the unfortunate circumstances of plaintiff's illness, the ADA does not provide for recovery against her employer. As noted, it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable accommodation, cannot, as a matter of law, be considered "otherwise qualified" under the ADA. That is the case here. Although plaintiff was given a limited release to seek employment in March of 2006, she concedes that her illness and treatment prevented her from performing the duties as defendant's store manager during the six months of chemotherapy.

App. at 8-9.

Such *per se* rules classifying accommodations as unreasonable go against both reason and the spirit of the Act, as well as the ruling of the Supreme Court in *Arline*. The text of the ADA clearly indicates Congress enacted the ADA to rid the nation of the kind

of discrimination the courts subscribing to the preceding view enable. "Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals." 42 U.S.C. § 12101(7). The need for medical leave is a need beyond the control of these individuals, and all the surrounding circumstances should be examined by a court to decide whether the leave is reasonable. The ADA does not provide a bright line that if employees cross, they become fair game for employers to fire.

Other circuits, as well as the EEOC, present a starkly different way of dealing with the issue presented in this case than the Eighth Circuit.

In its expert interpretation of the ADA, the EEOC views medical leave for recovery as a reasonable accommodation under the ADA, advising employers to grant such accommodations in its manual. "Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability." EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Compliance Manual (Oct. 17, 2002); available at
http://www.eeoc.gov/policy/docs/accommodatio

n.html. The document goes on to describe situations where leave as a reasonable accommodation is appropriate, including the exact situation involved in this case. "An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to: obtaining medical treatment (e.g., *surgery*, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy; *recuperating from an illness or an episodic manifestation of the disability*." *Id.* (emphasis added). The agency further illustrates how a situation much like Peyton's should be handled in the following example:

> An employee who has exhausted his accrued leave and most of his FMLA leave requests several months of unpaid leave commencing March 1st for surgery and recuperation related to his disability. His treating physician estimates that he will be able to return in June or July, depending on the speed of his recovery. The agency determines that the length of leave requested does not pose an undue hardship in terms of expense or operations given the nature of the employee's position and the agency's resources, and grants the request.

EEOC, Questions and Answers: Promoting Employment of Individuals in the Federal

Workforce (Sep. 30, 2008); available at: http://www.eeoc.gov/federal/qanda-employment-with-disabilities.html#reason.

The Ninth Circuit and others have ruled that determining whether a medical leave places an undue hardship on the employer requires a fact-specific, individualized inquiry. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999). "Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." *Id.*

In *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the Court not only overturned summary judgment for the employer in a case much like the one in question, but, in turn, awarded summary judgment to the employee. The court found that a three-month request for medical leave by a cancer patient was a reasonable accommodation the employer was required to provide, and stressed a need to evaluate each case on its own facts: "Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation." *Id.* at 648.

The Sixth Circuit declined to adopt rules automatically classifying a leave of absence as unreasonable under the ADA in *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998):

> Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a "reasonable accommodation" under the ADA. It is not clear why unpaid leave should be analyzed differently from any other proposed accommodation under the ADA.

Id. at 782.

The Tenth Circuit has also ruled that an extended medical leave of absence may be a reasonable accommodation under the ADA. *See Rascon v. U. S. West Commc'ns, Inc.*, 143 F.3d 1324 (10th Cir. 1998) (declaring a four-month leave of absence for an employee to treat his posttraumatic stress disorder a reasonable accommodation). The Third Circuit also reached the conclusion that the question of whether a leave of absence is reasonable is a question of fact. "Unpaid leave supplementing regular sick and personal days might, under [some] facts, represent a reasonable accommodation." *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 771 (3d Cir. 2004) (quoting *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 671 (3d Cir. 1999)), *cert. denied*, 544 U.S. 961 (2005).

Fred's easily could have offered a reasonable accommodation to Peyton. After Fred's fired Peyton, it hired the assistant manager of the store as the manager. This

fact, coupled with the fact that the store was without a manager for the six months prior to Peyton's hiring, evidences Fred's ability to employ the assistant manager as interim manager until Peyton's recovery with no undue hardship. But the Eighth Circuit refused to allow this to be considered as a fact question, frustrating the purpose of the ADA.

In this case, the Eighth Circuit used a very narrow analysis of what individuals the ADA covers, excluding an entire class of disabled workers who need protection against discrimination. The Eighth Circuit, and the other courts that have ruled similarly, ignored the intent of Congress by denying protection to disabled individuals able to carry out the essential functions of the job when given a reasonable accommodation of medical leave.

B. Respondent Terminated Petitioner Before She Had Any Reasonable Opportunity to Request an Accommodation.

When Fred's terminated Peyton, she was recovering from ovarian cancer surgery performed just two days before. Heavily medicated to the point where she does not even remember the conversation, and lying in her hospital bed, Fred's regional manager asked Peyton over the telephone simply, "How can we accommodating [sic] you?" Without appreciating any legal significance this request may have, and without knowledge from her doctor of what her recovery would entail, Peyton responded that she did not

know. The Eighth Circuit ruled that conversation amounted to a request for an indefinite leave, allowing Fred's to fire Peyton at will.

No reasonable individual could expect a person to provide this information under these extreme circumstances, and without an opportunity to confer with her doctor. Neither does the ADA:

> Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

García-Ayala, 212 F.3d at 648.

Fred's should have allowed Peyton time to discover what accommodation she needed, instead of firing a pre-emptive strike at a time when she was unlikely able to answer the accommodation question with specificity. Following the Eighth Circuit's ruling, a company may legally fire an employee, despite just undergoing a serious medical procedure or suffering a significant injury, as long as the employer asks the employee what accommodation is needed before the employee has any opportunity to discover such information. Congress did not intend this

when enacting the ADA, and this Court may restore the rights of the disabled by granting certiorari and reversing the Eighth Circuit.

C. Respondent Failed to Make a Good Faith Effort to Participate in the "Interactive Process."

Not only did Fred's fail to reasonably accommodate the Petitioner, it failed to even participate in the required "interactive process" to determine what accommodation would be needed.

To determine whether an accommodation for the employee is necessary, and if so, what that accommodation might be, it is necessary for the employer and employee to engage in an "interactive process." *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 951 (8th Cir.1999). A disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process: "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Id.* at 952.

The first element in determining Fred's failed to participate in the interactive process is obviously met, as Fred's was well aware of Peyton's disability and condition. Turning to

the second element, it is detailed above how Fred's did not give Peyton an opportunity to request an accommodation, because it fired her before she ever had the chance. Although addressed in few reported decisions, the need for the employer to give the employee a reasonable opportunity to make a request is obvious. One court opined, "the court thinks it likely that the employee's failure to describe any accommodation prior to termination would not be fatal in the situation where an employer immediately fires an employee upon learning of the employee's disability, thereby precluding any opportunity for the employee to specify or describe what accommodations are required." *Valentine v. Am. Home Shield Corp.*, 939 F.Supp. 1376, 1401 (N.D. Iowa 1996). Common sense dictates that if an employer fires an employee before the employee had any reasonable opportunity to request an accommodation, the employer should not be able to rely on the employee's failure to request that accommodation as a defense.

Thirdly, Fred's failed to make a good faith effort to accommodate Peyton, as it fired her just two days after her surgery for ovarian cancer after only a brief phone conversation with her as she lay in her hospital bed. In fact, Fred's made no effort to accommodate Peyton in any way; it simply terminated her because she became inflicted with ovarian cancer.

Finally, Peyton could have been reasonably accommodated but for Fred's lack of good faith. Fred's should have granted

Peyton a temporary leave of absence as a reasonable accommodation, as detailed earlier.

Fred's did not offer Peyton any reasonable accommodation and it failed to even make a good faith effort to participate in an interactive process to determine what that accommodation would be. Therefore, Fred's violated the ADA by terminating Peyton because of her ovarian cancer.

D. No Jurisdictional Hurdles or Other Issues Prevent This Court From Deciding the Important Issues Affecting the Disabled.

If the Court grants certiorari, no jurisdictional issues prevent the Court from ruling on the questions presented. Petitioner followed the correct procedure in ADA claims by obtaining a right to sue letter from the EEOC and correctly sued in federal court under federal question jurisdiction. Additionally, if Respondent had any basis to bring a jurisdictional challenge, it has since been waived.

Before a plaintiff may sue under an ADA claim, she must first file an EEOC charge, and obtain a right to sue letter from the commission. *See Dao v. Auchan Hypermarket*, 96 F.3d 787 (5th Cir. 1996). Once the plaintiff receives that letter, she has 90 days to file suit. If the correct procedure of filing the EEOC charge and lawsuit is not followed, it may subject the plaintiff to a challenge of ability to sue. *Id.* But these challenges are subject to waiver, as this Court

ruled: "We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

After filing a charge with the EEOC, Petitioner received a right to sue letter from the EEOC on October 26, 2006. Suit was filed in the Eastern District of Arkansas on January 22, 2007, within the 90-day period allowed by the EEOC. Additionally, the Respondent admitted the district court correctly had jurisdiction in its Answer, therefore waiving any possible challenge.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER A LEAVE OF ABSENCE MAY BE A REASONABLE ACCOMMODATION UNDER THE ADA.

The Court should grant certiorari to resolve a split among the circuits on the important issue of whether a medical leave of absence may be considered a reasonable accommodation to classify an employee as an "otherwise qualified individual" under the ADA.

Several circuits correctly recognize this as a fact issue that should proceed to the inquiry of whether the leave of absence would

be reasonable considering all of the surrounding circumstances. These courts rule a temporary leave of absence is a reasonable accommodation under the ADA, unless it places undue hardship on the employer. Contrastingly, the Eighth Circuit and others refuse to classify any leave of absence as a reasonable accommodation that enables an employee to perform the essential functions of her job, and deny any protection under the ADA to those physically unable to show up for work for any amount of time. The two differing views of the issue squarely conflict with each other.

In the Eighth Circuit's opinion in this case, the Court refused to grant Peyton qualified individual status because "her illness and treatment prevented her from performing the duties as defendant's store manager during the six months of chemotherapy." App. at 8-9. This decision squarely conflicts with the holdings of the First Circuit in *García-Ayala* 212 F.3d 638 (three month medical leave for cancer patient was a reasonable accommodation under the ADA), the Sixth Circuit in *Cehrs*, 155 F.3d 775 (leave for an indefinite duration or lengthy period such as one year could be a reasonable accommodation), the Ninth Circuit in *Nunes*, 164 F.3d 1243 (extended medical leave may be a reasonable accommodation if it does not impose an undue hardship on employer), the Tenth Circuit in *Rascon*, 143 F.3d 1324 (four month medical leave to treat posttraumatic stress disorder was a reasonable

accommodation), and the Third Circuit in *Williams*, 380 F.3d 751 (unpaid leave under some facts may be a reasonable accommodation).

In direct contradiction to the EEOC and courts mentioned above, other circuits have either set *per se* rules concerning the length of a leave of absence, or ruled that an employer need not even consider a leave of absence as a reasonable accommodation, as long as the employer terminates the employee at a moment while she is physically unable to return to work. *See, e.g; Rogers*, 87 F.3d at 759 (ruling an individual who was unable to attend work because he was recovering from ankle surgery could not possibly be a "qualified individual" under the ADA in the Fifth Circuit because he could not attend work on the date of termination); and *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003) ("Inability to work for a multi-month period removes a person from the class protected by the ADA"), *cert. denied*, 540 U.S. 881 (2003).

In deciding this case, the Eighth Circuit relied on its ruling in *Browning v. Liberty Mutual Insurance Co.*, 178 F.3d 1043 (8th Cir. 1999), *cert. denied*, 528 U.S. 1050 (1999), where it denied protection of the ADA to a data entry clerk who developed cubital tunnel sydrome as a result of her job duties. *Id.* at 1045. In *Browning*, the Court declared the plaintiff was not an "otherwise qualified individual" at the time of termination, June 9, *id.* at 1047, because she was "unable to report for work the entire week of June 5." *Id.* at

1048. Apparently, as long as an employee is unable to report to work at the time of termination, the Eighth Circuit endorses termination.

The Fourth Circuit construes the meaning of "qualified individual" similarly. *See Myers*, 50 F.3d at 283 (interpreting "qualified individual with a disability" as one who is able to perform the essential functions of his position presently, with no allowance for time for a disabled person to recover). The Eleventh Circuit also does not allow medical leave as a reasonable accommodation. *Duckett*, 120 F.3d 1222 (holding the plaintiff could not be classified as a qualified individual because his doctor had not released him to work at the time of his termination).

In *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181,185 (footnote 5) (2d Cir. 2006), the Second Circuit acknowledged the law is unclear regarding the issue of leave as a reasonable accommodation. The court declined to take a position on the issue, but stated:

> We note, however that the idea of unpaid leave of absence as a reasonable accommodation presents "a troublesome problem, partly because of the oxymoronic anomaly it harbors" – the idea that allowing a disabled employee to leave a job allows him to perform that job's functions – "but also because of the daunting challenge of line-drawing it presents."

Id. (quoting *Garcia-Ayala*, 212 F.3d at 651-652 (O'Toole, J., dissenting)). There is a clear split among the courts of appeals, a conflict that may mean the difference between gainful employment and homelessness to a significant faction of society.

At least 10 of the circuit courts of appeals have considered the issue of whether a medical leave may be a reasonable accommodation under the ADA, and the rulings of five of the circuits directly conflict with the rulings of the other five. By granting certiorari and reversing the Eighth Circuit, this Court will resolve the split among the circuits, and reinstate the intended rights of the disabled.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Floyce Reed Peyton,
Appellant,

v. No. 08-2346

Fred's Stores of Ark., Inc.
Appellee,

Appeal from the United States District Court
for the Eastern District of Arkansas –
Batesville

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 15, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Floyce Reed Peyton,
Appellant,

v. No. 08-2346

Fred's Stores of Ark., Inc.
Appellee,

Appeal from the United States District Court
for the Eastern District of Arkansas
Brian S. Miller, District Judge
Submitted: January 14, 2009
Filed: April 15, 2009
Reported at: 561 F.3d 900

Before MURPHY and SMITH, Circuit Judges, and LIMBAUGH[1], District Judge.
LIMBAUGH, District Judge.

Plaintiff Floyce Peyton brought this action to recover damages from her former employer, Fred's Stores, pursuant to the Americans With Disabilities Act (ADA), 42 U.S.C. sec. 12101 et seq. The District Court[2] entered summary judgment in favor of defendant. The dispositive issue is whether

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[1] The Honorable Stephen N. Limbaugh, Jr., United States District Judge for the Eastern District of Missouri, sitting by designation.

[2] The Honorable Brian Stacy Miller, United States District Judge for the Eastern District of Arkansas.

plaintiff, who became ill from cancer, was qualified to perform the essential functions of her job with or without accommodation. The judgment is affirmed.

Appellate review of summary judgment is de novo, affirming only when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). All evidence is reviewed in the light most favorable to the nonmoving party. *Celotex*, 477 U.S. at 330 n.2. "Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1099 (8th Cir. 2000). However, summary judgment is proper if the plaintiff fails to establish any element of his or her prima facie case. *Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000).

I.

The facts of the case, viewed in the light most favorable to plaintiff, the nonmoving party, are as follows:

On December 5, 2005, plaintiff, an experienced retail store manager, was hired by defendant for the position of manager of its

Heber Springs, Arkansas, store. During the remainder of December, 2005, and the first few days of January, 2006, plaintiff participated in defendant's three-week management training course, and on January 6, 2006, plaintiff assumed her new position at the Heber Springs store. On Monday morning, January 9, after working at the store only two days, plaintiff experienced pain in her abdomen which required her to consult with a physician. That same day, her physician diagnosed ovarian cancer and immediately referred her to the University of Arkansas Medical Center in Little Rock. Plaintiff told the assistant manager at the store that she would be hospitalized, and her fiancé then delivered a note to the assistant manager signed by the physician stating, "Floyce Peyton needs to be off work at least 1/9/06. Return date unknown."

Plaintiff underwent surgery for ovarian cancer on January 12. Between January 12 and 14, the area manager for Fred's Stores called plaintiff twice at the hospital. On the first call, she asked plaintiff how she was doing, and "How can we accommodating [sic] you?" Plaintiff responded that she did not know how long she would be out, but she was under the influence of pain medication and had no recollection of any question or discussion pertaining to accommodation. The area manager then called her supervisor, the regional vice-president, to advise him of the situation with plaintiff and the need for a manager at the store, and a decision was made to replace plaintiff. On January 14, the area

manager called plaintiff again, advising her that, "I have to let you go." Shortly thereafter, the then-assistant manager of the Heber Springs store was installed as manager.

Plaintiff subsequently underwent approximately six months of chemotherapy, but was given a limited release for work by her physician in March. After completing the treatment, plaintiff was physically able to perform the duties required as manager of defendant's store.

II.

Title I of the ADA bars employers from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The ADA further defines "discrimination" to include:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . .

Id. §12112(b)(5)(A)

As the statutory language indicates, ADA protection extends only to a qualified individual with a disability, namely, "an individual with a disability who, with or without reasonable accommodation, [who] can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA defines "reasonable accommodation" as:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B). To determine whether an accommodation for the employee is necessary, and if so, what that accommodation might be, it is necessary for the employer and employee to engage in an "interactive process." *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 951 (8th Cir., 1999); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000).

> A disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process: 1) the employer

> knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Fjellestad, 188 F.3d at 952 (citation omitted).

III.

The parties here agree that plaintiff was disabled because of her illness and treatment, and their sole focus is whether plaintiff was otherwise qualified to perform the essential functions of her job either with or without accommodation.

Defendant contends, and the District Court so held, that at the time of plaintiff's termination, she was unable to come to work at all, and for that reason she was not "otherwise qualified." As the District Court explained, the record shows that, after three days of work, Plaintiff informed Defendant that she would be out indefinitely. Indeed, at the time Defendant terminated Plaintiff, Defendant had no information indicating when, if ever, Plaintiff would be able to return to work. If anything, all of the information in Defendant's possession at the time of the termination, indicated that plaintiff would not return to work in the near future.

In response, plaintiff argues that

defendant failed to engage plaintiff "in the interactive process of discussing reasonable accommodation for her to continue her employment with [defendant]." At the outset, however, she acknowledges that ordinarily it is the plaintiff employee, rather than the defendant employer, who must initiate the interactive process. *Fjellestad*, 188 F.3d at 952. Nonetheless, she maintains that it was incumbent on defendant to initiate the process because she was still hospitalized and heavily medicated. In the absence of an 8th Circuit case directly supporting her proposition, and by analogy to cases involving an employee with a mental illness, she cites *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), which held that "if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." *Id.* at 1285. Plaintiff then adds that the brief conversation on January 12 in which the area manager appears to have initiated the interaction process by asking "How can we accommodating [sic] you?" (to which she replied, "I don't know. Indefinitely.") was wholly insufficient.

Despite the unfortunate circumstances of plaintiff's illness, the ADA does not provide for a recovery against her employer. As noted, it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable accommodation, cannot, as a matter of law, be considered "otherwise qualified" under the ADA. That is the case here. Although plaintiff was given a limited release to seek

employment in March of 2006, she concedes that her illness and treatment prevented her from performing the duties as defendant's store manager during the six months of chemotherapy. On the issue of reasonable accommodation, she admits that at the time of termination she had no idea when, if ever, she would be able to return and that a request for an indefinite leave of absence (regardless which party had the obligation to request it) is not a reasonable accommodation under the ADA. *Nowak v. St. Rita High School*, 142 F.3d 999, 1004 (7th Cir. 1998); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225-26 (11th Cir. 1997); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995); *see also, Ragsdale v. Wolverine Worldwide, Inc.*, 1998 WL 35169227,*7 (E.D. Ark. 1998). Instead, her request for reasonable accommodation, though made for the first time in this case, is that defendant should have waited indefinitely to determine the full extent of her diagnosis, treatment and recovery. To the extent that this argument is something other than a reconstituted claim for an indefinite leave of absence -- which it appears to be -- the claim still fails. Courts recognize that employers should not be burdened with guess-work regarding an employee's return to work after an illness. The Eighth Circuit has addressed the matter head on:

> Employers are not qualified to predict the degree of success of an employee's recovery from an illness or injury. To afford ... protections of the ADA during

> the early stages of . . . recuperation from surgery, . . would be to burden [the employer] with the duty to see into the future. We do not believe that such was the intent of Congress in passing the ADA.

Browning v. Liberty Mutual Insurance Co., 178 F.3d 1043, 1049 (8th Cir. 1999).

IV.

In sum, the uncontroverted evidence shows that plaintiff's illness caused her to be unable to perform the essential functions of her job as defendant's store manager and that there was no reasonable accommodation that would have allowed her to do so. Accordingly, the judgment is affirmed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Floyce Reed Peyton,
Plaintiff

v. No. 1:07-CV-002 BSM

Fred's Stores of Arkansas, Inc.
Defendant.

JUDGMENT

Upon the motion for summary judgment of Defendant [Doc. # 11], the response of Plaintiff [Doc. # 19], and the entire record, the court finds that Defendant's motion for summary judgment is well-taken and is hereby granted. This case is dismissed with prejudice and the parties shall bear their own costs.

IT IS SO ORDERED this 19th day of May, 2008.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

UNPUBLISHED
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Floyce Reed Peyton,
Plaintiff
v. No. 1:07-CV-002 BSM

Fred's Stores of Arkansas, Inc.
Defendant.

Brian S. Miller, District Judge
Opinion Filed: May 19, 2008

I. BACKGROUND

Defendant is part of a 650 store chain that operates throughout the southeastern United States, with roughly eighty stores in Arkansas. All the Arkansas stores operate with a store manager and some of the stores have an assistant manager. Stores without an assistant manager have an hourly support manager.

In December 2005, Plaintiff was hired as a store manager for Defendant's Heber Springs, Arkansas store. At the time that Defendant hired Plaintiff, its Heber Springs store had been without a store manager for approximately six months. Before assuming control of the Heber Springs store, Plaintiff trained at Defendant's Cabot, Arkansas store for three weeks. Upon completing her training, Plaintiff started work for Defendant on Friday, January 6, 2006. On January 9, 2006, just three days after starting work, Plaintiff was diagnosed with ovarian cancer and was unable

to return to work. Defendant was notified that Plaintiff could not return to work by Plaintiff's fiancé, who presented to Defendant's assistant manager, a note from Plaintiff's doctor.

Plaintiff was hospitalized on January 12, 2006. While she was hospitalized, Defendant's district manager called Plaintiff to see how she was doing and to inquire as to how Defendant could accommodate Plaintiff. Plaintiff informed the district manager that she did not know how Defendant could accommodate her and that she would be out indefinitely. Defendant terminated Plaintiff on January 14, 2006, because Plaintiff was unable to provide a prospective return date. At the time of her illness, Plaintiff had not been employed long enough to qualify for long term disability or leave under the Family Medical Leave Act (FMLA).

Plaintiff admits that, other than the note from her physician, she submitted nothing to document her illness or to state when she could return to work. She also admits that she did not ask Defendant for any type of accommodation.

Plaintiff sued Defendant on January 22, 2007 [Doc. #1] alleging that she was terminated in violation of the Americans with Disabilities Act (ADA) and the Arkansas Civil Rights Act (ACRA). She also alleges the tort of intentional infliction of emotional distress as a result of her termination.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the court determines that there is no genuine

issue of material fact, and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317, 323, (1986). The moving party has the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323; *Simpson v. Des Moines Water Works*, 425 F.3d 538 (8th Cir. 2005). The party opposing the motion for summary judgment must do more than rely on allegations or denials in the pleadings, and the elements of its prima facie case must be supported by specific facts sufficient to raise a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249,(1986); *Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836 (8th Cir. 2008). The court must view these materials in the light most favorable to the nonmovant, drawing all inferences in the nonmovant's favor. *Anderson*, 477 U.S. at 255. A genuine issue of fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Patel v. United States Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008); *Depositors Ins. Co. v. Wal-Mart Stores, Inc.*, 506 F.3d 1092 (8th Cir. 2007). Furthermore, to constitute a material fact the factual issue must potentially affect the outcome of the suit under the governing law. *Depositors Ins. Co.*, 506 F.3d 1092; *see also Holloway v. Pigman*, 884 F.2d 365 (8th Cir. 1989).

III. DISCUSSION

A. Plaintiff's Americans with Disabilities Act Claim

The Americans with Disabilities Act prohibits an employer from discriminating against an employee due to the disability of the employee. 42 U.S.C. §12112(a) (West 2005). The act seeks to prevent employers from making hiring, advancement, or discharge decisions based upon the disability of the employee. *See id.* The ADA defines discrimination as:

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the ... [employer's] business.

Id. § 12112(b)(5)(A). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2). "Otherwise qualified" means that the individual, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. *Id.* § 12111(8). Thus, to establish a claim under the ADA, Plaintiff must show (1) that she has a disability; (2) that she is qualified to perform

the essential functions of the job, with or without reasonable accommodation; and (3) that she has suffered adverse employment action because of her disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (*citing Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995)).

Given the facts of this case, the question is whether there are any issues of material fact in dispute regarding whether Plaintiff has shown that she (1) was disabled at the time Defendant terminated her, (2) was qualified to perform the essential functions of her job with Defendant with or without reasonable accommodation, at the time she was terminated, and (3) whether she suffered an adverse employment action because of her disability. The record is pretty clear that Plaintiff has satisfied questions (1) and (3) because her termination was based on her inability to come to work as a result of her ovarian cancer. Therefore, the key question is whether there is any dispute as to whether she was qualified to perform the essential functions of her job with Defendant.

This is a very sad case, but the court is convinced that there are no issues of material fact in dispute regarding whether Plaintiff could perform the essential functions of her job, either with or without an accommodation. It is without question that she could not. Essential functions are the fundamental job duties but not the marginal functions of a particular job. *Rehrs. Iams Co.*, 486 F.3d 353 (8th Cir. 2007). Regular attendance at work is an essential function of employment. *Brannon*

v. Luco Mop Co., 521 F.3d 843 (8th Cir. 2008). And, "an employee who is 'unable to come to work' on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones."*Moore v. Payless Shoe Source*, 139 F.3d 1210 (8th Cir.1998)(*quoting Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1997)); *see also Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir.1996) (employee who, at time of termination, could not attend work due to medical condition was not "qualified" under the ADA); *Foremanye v. Board of Cmty Coll. Trs.*, 956 F.Supp. 574, 578-79 (D.Md.1996). Furthermore, the ADA does not require an employer to provide an unlimited absentee policy. *See Buckles v. First Data Res., Inc.*, 176 F.3d 1098 (8th Cir. 1999).

The record shows that, after three days of work, Plaintiff informed Defendant that she would be out indefinitely. Indeed, at the time Defendant terminated Plaintiff, Defendant had no information indicating when, if ever, Plaintiff would be able to return to work. If anything, all of the information in Defendant's possession at the time of the termination, indicated that Plaintiff would not return to work in the near future. Therefore, Plaintiff was unable to perform an essential function of her
employment. For this reason, there are no issues of material fact in dispute regarding Plaintiff's ADA claim and that claim should be dismissed.

B. Plaintiff's Arkansas Civil Rights Act Claim

Claims brought pursuant to the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101 *et seq.*, are analyzed using the same principles employed in analyzing claims under the ADA, *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002). Further, in an unpublished opinion, this court looked to case law interpreting the ADA in addressing the plaintiff's failure to accommodate claim under the ACRA "because both statutes refer to the right of an 'otherwise qualified person' to 'obtain and hold employment without discrimination.'" *Ragsdale v. Wolverine Worldwide, Inc.*, No. J-C-97-475, *5 n. 3 (E.D. Ark. Nov. 3, 1998) (order).

Summary judgment is appropriate on Plaintiff's ACRA claim for same reason it is appropriate on her ADA claim; Plaintiff was unable to come to work. Therefore, she was simply unable to perform an essential function of her employment. For this reason, there are no issues of material fact in dispute regarding Plaintiff's ACRA claim and that claim should be dismissed.

C. Intentional Infliction of Emotional Distress

To succeed on an intentional infliction of emotional distress claim, the claimant must prove: (1) the actor intended to inflict emotional distress, knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the conduct was the cause of the plaintiff's

distress; and (4) the plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it. *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996). The conduct complained of must be so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. *Neff v. St. Paul Fire & Marine Ins. Co.*, 304 Ark. 18, 799 S.W.2d 795 (1990).

As stated above, this is a sad case, but the court is convinced that there are no genuine issues of material fact in dispute and that Plaintiff's intentional infliction of emotional distress claim must be dismissed. In making this ruling, the court is guided by the opinion and logic of the Arkansas Supreme Court in the case of *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982). In that case, the plaintiff sued the defendant, his former employer, for intentional infliction of emotional distress for the outrageous manner in which the defendant fired the plaintiff. *Id.* In affirming the trial court's dismissal of the plaintiff's claim, the court held that "[i]t is for the trial court to determine, in the first instance, whether the conduct may reasonably be regarded as so outrageous as to permit recovery." *Id.* at 372 (*citing* Restatement of Torts (2d), s 46 Comment d (1965)). The court further held that

> If [plaintiff's] testimony presents an issue of fact, then any employee who is abruptly discharged by an angry boss is

> entitled to have the asserted tort submitted to a jury. That is not the law. The trial judge was unquestionably right in granting the partial summary judgment.

Id.

Although the court is mindful that this is a tort claim in which the issues to be resolved are usually highly fact intensive, it is the court's responsibility "to determine, in the first instance, whether the conduct may reasonably be regarded as so outrageous as to permit recovery." *Id.* The court specifically finds that the record shows that Defendant's actions were not extreme and outrageous and utterly intolerable in a civilized community. This is true because, at the time she was terminated, Plaintiff was unable to perform the essential functions of her job because she was unable to come to work. If the court were to find that Defendant's actions were outrageous and utterly intolerable in a civilized community, it would mean that any employee, who is discharged because she is unable to return to work due to illness or injury, would be entitled to have the her tort claim submitted to a jury. *See id.* According to the Arkansas Supreme Court, that is simply not the law in Arkansas. For these reasons, Defendant's motion for summary judgment on Plaintiff's intentional infliction of emotional distress claim is granted.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12111

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapther, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or other devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of

the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--
(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Supreme Court, U.S.
FILED
AUG 14 2009
OFFICE OF THE CLERK

No. 09-62

In The
Supreme Court of the United States

FLOYCE REED PEYTON,

Petitioner,

v.

FRED'S STORES OF ARKANSAS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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August 14, 2009

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RULE 29.6 STATEMENT

Fred's Inc. is the 100% owner of Respondent Fred's Stores of Arkansas, Inc, and its successor Fred's Stores of Tennessee, Inc. Fred's Inc.'s stock is publicly traded (NASDAQ: FREDS).

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STATEMENT OF THE CASE

Plaintiff-Appellant Floyce Reed Peyton ("Peyton") sued Fred's Stores of Arkansas, Inc. ("Fred's") for recovery of damages under the Americans with Disabilities Act, 42 U.S.C. §12101 *et. seq.* ("ADA"), the Arkansas Civil Rights Act ("ACRA")[1] and the common law tort of intentional infliction of emotional distress.[2] Fred's hired Peyton as the manager of its Heber Springs, Arkansas store on or about December 5, 2005. Peyton trained under a manager of the Cabot, Arkansas store for approximately three (3) weeks before assuming her duties in Heber Springs. Peyton then worked for only two days at the Heber Springs store. On her third day as store manager, January 9, 2006, Peyton's fiancé went to the store with a physician's note stating that Peyton needed to be off work on January 9, 2006, and stating that "return date unknown @ [at] this time." (APP. 41.) Upon inquiries by Fred's, nobody could tell Fred's when, or even if, she would be able to return to work.

This Petition follows the Eighth Circuit Court of Appeals' affirmance of the Arkansas Eastern District Court's order granting Fred's Motion for Summary Judgment. When ruling, the Eighth Circuit stated "it is axiomatic that a person who cannot perform any of the functions of a job, with or without reasonable

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[1] The dismissal of this claim was not raised by Plaintiff in the Eighth Circuit appeal, and, as a consequence, any claim of error has been waived.

[2] The dismissal of this claim was not raised by Plaintiff in the Eighth Circuit appeal, and, as a consequence, any claim of error has been waived.

accommodation, cannot, as a matter of law, be considered 'otherwise qualified' under the ADA." *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009). The court held that "in sum, the uncontroverted evidence shows that plaintiff's illness caused her to be unable to perform the essential functions of her job as defendant's store manager, and that there was no reasonable accommodation that would have allowed her to do so." *Id.* at 904.

Plaintiff-Appellant filed her Petition for A Writ of Certiorari on July 14, 2009.

STATEMENT OF THE FACTS

On or about December 5, 2005, Fred's hired Peyton to manage its Heber Springs, Arkansas retail store. Before assuming her duties at the Heber Springs store, Peyton underwent manager training at the Fred's store in Cabot, Arkansas for approximately three (3) weeks. After training, Peyton was to assume her full duties as store manager in Heber Springs. Peyton reported to work in Heber Springs on January 6th and 7th, 2006, but on January 9th, her third day of work, her fiancé arrived at the store with a doctor's note saying that Peyton would not be able to come to work that day and "return date unknown @ [at] this time." (APP. 41.)

Apparently, Peyton was diagnosed with cancer. She sought medical treatment in Little Rock, Arkansas. Nobody, including her doctor, was able to give Fred's a timeline for her return. (APP. 38-39). Due to her short period of employment, Peyton was not eligible for any benefits under the Family Medical Leave Act. Peyton never requested any accommodation. (APP. 40).

APPLICABLE LAW

Petitioner's ADA claim turns on whether she was a "qualified individual" and whether the indefinite leave she sought was a "reasonable accommodation." These terms, as they are applicable to this case, are defined in the ADA:

> (8) Qualified individual: The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds....
>
> (9) Reasonable accommodation: The term "reasonable accommodation" may include – (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices ....

42 U.S.C. §12111 (8) and (9).

Petitioner was unable to perform any of the functions of her job, let alone the essential ones. Thus, she was not "otherwise qualified." Given that she was unable to report to work, there was no "reasonable accommodation" that would allow her to perform her job.

I. REASONS WHY THE PETITION SHOULD BE DENIED

The Arkansas District Court and the Eighth Circuit Court of Appeals correctly identified the key issue in

this case as being whether Petitioner was "otherwise qualified" as defined by the ADA and therefore within its protective scope. Both courts concluded that Petitioner was not "otherwise qualified" because she was unable to perform the essential functions of her job with or without an accommodation. Addressing an argument first made by Petitioner on appeal, the Eighth Circuit Court of Appeals also found that "her request for reasonable accommodation, though made for the first time in this case, is that defendant should have waited indefinitely to determine the full extent of her diagnosis, treatment and recovery." This "reconstituted" claim for an indefinite leave of absence likewise fails to raise an issue of reasonable accommodation. *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900, 903 (8th Cir. 2009).

Petitioner states a new argument for the first time in her Petition that was not raised in either the District Court or the Court of Appeals. (See Petition, pgs. 17-18). She claims she did not understand the legal significance of Respondent's question to her regarding accommodations; however, her understanding of the legal significance of such questions has no bearing on the facts of the case or the Eighth Circuit's ruling affirming summary judgment. Because Petitioner did not raise this issue with the courts below, it is now too late to argue this point in an attempt to obtain review from this Court.

Petitioner claims that there is a split among the Circuit Courts as support for certiorari under Rule 10 of the Supreme Court Rules. To the contrary, no such split exists.

A. The reported decisions of nine circuit courts of appeal have each held that indefinite leave is not reasonable accommodation under the ADA.

In reported decisions, nine of the Circuit Courts of Appeals have addressed the issue of indefinite leave and each concluded that indefinite leave is not a reasonable accommodation under the ADA.[3] The remaining two circuits have come to the same conclusion in unreported decisions.[4] The facts in those cases are closely aligned with the facts of Petitioner's claim because in each the plaintiff was unable to provide their employers with an anticipated date of return. The courts determined that the plaintiffs were not "otherwise qualified" to perform the essential functions of their jobs and that, as a result, the ADA did not require accommodation. Similarly, Petitioner is not "otherwise qualified."

In *Watkins v. J & S Oil Company, Inc.*, 164 F.3d 55, 62 (1st Cir. 1998), the First Circuit affirmed summary judgment for the employer where the proof

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[3] *Watkins v. J & S Oil Company, Inc.*, 164 F.3d 55 (1st Cir. 1998); *Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (2d Cir. 1999); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996); *Walsh v. United Parcel Sevice*, 201 F.3d 718 (6th Cir. 2000); *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998); *Duckett v. Dunlop Tire Corporation*, 120 F.3d 1222 (11th Cir. 1997).

[4] *Fogleman v. Greater Hazleton Health Alliance*, 122 Fed. Appx. 581 (3d Cir. 2004); *Dudley v. California Department of Transportation*, 213 F.3d 641 (table), 2000 WL 328119 (9th Cir. 2000).

showed only what could be construed as a request for indefinite leave observing that "...Watkins 'never informed [J & S] as to when he might be able to return or what accommodations he might require'...." The *Watkins* facts are directly analogous to the facts in Petitioner's case. Petitioner never requested any accommodation and could not advise Respondent when she would be able to return to work. Like the Eighth Circuit, the First Circuit concluded that "J & S was not required, for ADA purposes, to provide accommodation to Watkins for what amounted to an 'indefinite leave.'" *Watkins*, 164 F.3d at 62.

In similar fashion, the Second Circuit has held that an employer is not required to grant an indefinite leave of absence to an employee who is totally disabled and unable to inform the employer when he expected to be able to return to work. *See Mitchell v. Washingtonville Central School District,* 190 F.3d 1, 9 (2d Cir. 1999) and cases cited therein.

The Fourth Circuit has held that "...reasonable accommodation does not require [an employer] to wait indefinitely for [its employee's] medical conditions to be corrected, especially in light of the uncertainty of cure", in response to plaintiff's request for time to cure his disability without providing a "temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions." *Myers v. Hose*, 50 F.3d 278, 282-83 (4th Cir. 1995). Here too, Petitioner has taken the position that Respondent should have waited an indefinite period of time to allow her to cure her disability. The ADA does not require such an accommodation.

The Fifth Circuit likewise has held that an employer does not have to wait an indefinite period of time for an employee to cure disability. In *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996), the plaintiff was unable to attend work for an extended period of time due to elective ankle surgery. The Fifth Circuit rejected plaintiff's argument that the defendant was required to accommodate him by allowing indefinite leave and held: "[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." *Rogers*, 87 F.3d at 759-60, citing *Myers*, 50 F.3d at 283.

The Sixth Circuit has ruled that reasonable accommodation under the ADA does not require providing an employee with indefinite leave. "[W]hen the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide." *Walsh v. United Parcel Service*, 201 F.3d 718, 727 (6th Cir. 2000).

The Seventh Circuit agrees with its sister circuits that a request for indefinite leave does not constitute a request for reasonable accommodation under the ADA. In *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 381 (7th Cir. 2003), the plaintiff did not want a defined period of time off, instead "his only proposed accommodation is not working for an extended time,

which as far as the ADA is concerned confesses that he was not a 'qualified individual'...." The "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Byrne*, 328 F.3d at 381. In an earlier Seventh Circuit case, the plaintiff was not present at his teaching position for approximately eighteen (18) months prior to his termination and did not indicate "to any St. Rita administrator his intention to return to his teaching position." *Nowak v. St. Rita High School*, 142 F.3d 999, 1003 (7th Cir. 1998). An individual who is not able to come to work is not "otherwise qualified" under the ADA. "The ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." *Id.* at 1004.

Courts recognize the distinction between an employee who requests a defined period of time off of work to receive medical treatment versus an employee that cannot articulate an anticipated date of return to work. In one of the cases cited in the Petition for Certiorari, the Tenth Circuit stated that "an allowance of time for medical care or treatment may constitute a reasonable accommodation", but that "an indefinite leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment." *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998).

In *Duckett v. Dunlop Tire Corporation*, 120 F.3d 1222 (11th Cir. 1997), the plaintiff and his doctor admitted that the plaintiff "was unable to return to work in any capacity when he was terminated and required an indefinite medical leave." *Duckett*, 120

F.3d at 1225. The Eleventh Circuit cited *Myers v. Hose* and stated that "[n]othing in the text of the reasonable accommodation provision requires an employer to wait for an indefinite period for an accommodation to achieve its intended effect." *Duckett,* 120 F.3d at 1226.

Petitioner's argument in support of certiorari is that she made a request for temporary medical leave as an accommodation under the ADA. Nothing in the record supports Petitioner's argument that she sought temporary medical leave. The record establishes that Petitioner did not, upon inquiry, tell the Respondent how much time she needed to recover from surgery nor when she expected to return to work. (APP. 38).

The circuits holding that indefinite leave is not a reasonable accommodation have come to this conclusion based on the particular facts of each case. However, the primary fact commonly relied upon was that the plaintiffs were unable to provide their employers with any finite period of leave. Courts have consistently, and unanimously, held that such a broad and open-ended request is not reasonable and renders the plaintiffs not "otherwise qualified" for ADA protected leave.

Nothing in the ADA's definition of "reasonable accommodation" mentions indefinite leave. If it did, every person with a long term illness or disease would be entitled to job protection for an indefinite period of time and the ADA would function as permanent job insurance, a result clearly not contemplated by Congress. *See Taylor v. Wal-Mart Stores, Inc.*, 376 F. Supp. 2d 653 (E.D. Va. 2005). While this is what Petitioner is apparently seeking, the ADA does not support her position.

B. Cases cited in Petitioner's brief in support of a circuit split are inapposite to the facts of her case and do not address the issue of indefinite leave as a reasonable accommodation under the ADA.

Petitioner has cited no cases in her Petition for Certiorari holding indefinite leave is a reasonable accommodation where the plaintiff is unable to provide a date for returning to work. The record shows that Petitioner never informed the Respondent of a date when she could return to work and her case is one seeking indefinite leave as an ADA accommodation. (APP. 38-39).

Petitioner attempts to create a circuit split by citing cases that do not address indefinite leave. In the cases cited, the employees or their doctor provided the employer with an anticipated date of return and the issue of leave as a reasonable accommodation under the ADA only arose when additional leave was not granted under the facts of each case. *See, e.g.*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 642 (1st Cir. 2000) (Plaintiff's doctors informed defendant that the plaintiff would be able to return to work on July 30, 1996); *Graves v. Finch Pruyn & Company, Inc.*, 457 F.3d 181, 185 (2d Cir. 2006) (Plaintiff informed defendant that he needed a couple of more weeks to consult with a foot specialist and the Second Circuit determined that this was not a request for indefinite leave); *Walton v. Mental Health Association of South-Eastern Pennsylvania*, 16 F.3d 661, 664-65 (3d Cir. 1999) (Plaintiff wrote defendant a letter wherein she advised that her doctor did not want her to return to work until November 22 and that she intended to return on that date); *Cehrs v. Northeast*

Ohio Alzheimer's Research Center, 155 F.3d 775, 778 (6th Cir. 1998) (Plaintiff's doctor provided a form advising defendant of plaintiff's tentative return date of January 20, 2004. Plaintiff previously did not state a date of return; defendant required a date to be provided, which was then provided); *Nunes v. Wal-Mart Stores*, Inc., 164 F.3d 1243, 1245 (9th Cir. 1999) (Plaintiff's physician informed defendant that her disability started on March 7, 1995 and estimated she could return to work on May 1, 1995).

The cases cited above from Petitioner's brief include fact settings different from hers and are inapplicable to the central issue of her case; whether indefinite leave is a reasonable accommodation.

II. CONCLUSION.

The Petitioner does not present any unique or unsettled questions of law supporting a grant of certiorari. Every circuit has addressed the issue of indefinite leave as a reasonable accommodation under the ADA and each has come to a single conclusion: the ADA does not require indefinite leave. The issue is well settled and there is no circuit split to be resolved. The Petition fails to satisfy the requirements of Rule 10 of the Supreme Court Rules. The Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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(3)

No. 09-62

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In The

Supreme Court of the United States

FLOYCE REED PEYTON,

Petitioner,

v.

FRED'S STORES OF ARKANSAS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

In its response, Respondent, Fred's of Arkansas ("Fred's") mischaracterizes both the issue of the case and the arguments presented by Petitioner, Floyce Reed Peyton ("Peyton"). The question the Court should consider in this case is whether a temporary medical leave of absence may be a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") if the accommodation does not place an unfair burden on the employer – a question which the circuit courts of appeals answer inconsistently. By resolving the split among the circuits concerning this issue, the Court can clarify the rights to an entire class of people the ADA intended to protect.

Respondent attempts to frame the issue as whether an *indefinite* leave is a reasonable accommodation under the ADA, but this view suggests Fred's allowed Peyton a reasonable opportunity to request an accommodation, and that Peyton requested an indefinite leave. Neither assertion warrants merit, as Fred's fired Peyton without allowing her an opportunity to request an accommodation, and Peyton never requested an indefinite leave. Furthermore, in its attempt to claim no circuit split exists, Respondent cites cases distinguishable from the factual situation in this case.

Respondent also claims Peyton presents, here for the first time, the argument that she was medicated and failed to understand the significance of Fred's question

regarding accommodation. That simply is not true. The fact Peyton was medicated is not a standalone argument, but a fact supporting the argument Fred's never allowed Peyton an opportunity to request an accommodation. Petitioner clearly raised this argument in both the district court and the Eighth Circuit, as shown below.

The Court should grant certiorari to decide this important question affecting an entire class of disabled people and settle the split among the circuits by reversing the Eighth Circuit.

A. THE ISSUE IN THIS CASE IS WHETHER TEMPORARY MEDICAL LEAVE MAY BE A REASONABLE ACCOMMODATION, AS FRED'S NEVER ALLOWED PETITIONER THE OPPORTUNITY TO REQUEST AN ACCOMMODATION, AND SHE NEVER REQUESTED INDEFINITE LEAVE.

Respondent repeatedly frames the issue of this case as whether an *indefinite* leave is a reasonable accommodation under the ADA. *See* Br. in Opp. 5. But, unlike the cases cited by Respondent, Fred's denied the Petitioner in this case any opportunity to request an accommodation, firing her before she had a chance to ask. Therefore, the issue in this case is not one of indefinite leave, as Petitioner never asked for an indefinite leave; the issue is whether a temporary medical leave (which Petitioner would have requested had she not been terminated before she had the

opportunity) may be a reasonable accommodation under the ADA if the accommodation does not create an unfair burden on the employer.

It is important to bear in mind that, in the case involved in this proceeding, Fred's terminated Peyton *within two days of surgery* for her cervical cancer, while she was still hospitalized, and without having been provided *any* accommodation, such as time to speak to her physician about the length of her convalescence and when she might be able to return to work, let alone the opportunity for a short convalescence before returning to work. Now, Fred's relies on Petitioner's failure to give it a definite time period of absence virtually immediately after surgery as a defense. This argument rebels against common sense and ordinary decency, as well as the spirit of the ADA. *See* Pet. 20. Had Fred's allowed Petitioner a reasonable period after surgery to discover what accommodation she needed, a defined period of leave would have been requested; however, Fred's fired a pre-emptive strike, terminating Petitioner before it would have to provide her with a reasonable accommodation. If this were permissible conduct, any employer could terminate an employee immediately upon the employee's becoming ill or injured, without fear of violating the ADA.

This factual situation distinctly contrasts with the cases Respondent cites suggesting the issue is one of indefinite leave, and that no circuit split exists. The First, Third, Sixth, Ninth, and Tenth Circuits have

all held a temporary medical leave may be a reasonable accommodation under the ADA. Pet. 23-24. In claiming these circuits have ruled differently, the Respondent cites two unpublished cases and three other cases factually distinguishable from this case. Br. in Opp. 5-9. In each of these cases employers provided the employee with ample time and opportunity to request a defined period of absence. In fact, in most of the cases cited by Respondent, the employer allowed the employee an extended period of leave, and only terminated the employee when the employee failed to provide any timetable of how much additional leave was needed.

In *Walsh v. United Parcel Services*, 201 F.3d 718 (6th Cir. 2000), a case cited by the Respondent as analogous to this case (Br. in Opp. 7), the court detailed the extremes to which the employee had been previously accommodated when the court declined to declare the additional leave requested by the employee as a reasonable accommodation:

> In this case, plaintiff knew of his injury for years, was on salary continuation for a year, and unpaid medical leave for five months before being terminated. As noted above, even the last medical evaluation which defendant received from a homeopathic physician, months after the deadline set by the defendant, only contained a vague estimate of the date that plaintiff could return to his job as a pilot, placing it at one to three years in the future.

Walsh, 201 F.3d at 726-27. *See also Watkins v. J & S Oil Co.*, 164 F.3d 55 (1st Cir. 1998) (relying on employee's failure to request any accommodation in a situation where the employee was on leave for a two month period, and had three discussions with the employer during that time); *Rascon v. U S West Commc'ns, Inc.*, 143 F.3d 1324 (ruling a temporary medical leave a reasonable accommodation when the employee asked for a an additional four months of leave after he had already taken nearly five months of leave, and only mentioning the existence of the rule against an indefinite leave in some circuits).

While some of the above circuits held that the employer was not required, for ADA purposes, to provide what amounted to an indefinite leave, those facts are not in the least way apropos to those in the case now before the Court. The lack of cases presenting a situation where an employer fired a disabled employee immediately upon the onset of the disability without allowing the employee any reasonable opportunity to request an accommodation, such as occurred in this case, evidences the rarity and outrageousness of Fred's actions.

As the cases cited by Respondent rebutting the presence of a circuit split address a different factual scenario and a different issue altogether,[1] this Court should

[1] Although the issue in this case is broader than what Respondent suggests, there is also authority suggesting disagreement among the circuits on the issue of

grant certiorari to settle the split among the circuits as illustrated in the Petition for Writ of Certiorari. *See* Pet. 22-26.

B. PETITIONER RAISED PEYTON'S MENTAL CONDITION IN THE DISTRICT COURT AND EIGHTH CIRCUIT.

Throughout this case, both in the district court and the Eighth Circuit, Petitioner consistently raised the fact that Peyton was medicated and not fully alert during her communications with Respondent following surgery. In its brief, Respondent asserts that Petitioner claims for the first time in this Court that she did not understand the significance of questions asked by Fred's district manager during a brief telephone call to Peyton while in her hospital bed. This is not a new argument at all, as demonstrated by the record below.

In the district court, the Brief in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment shows Petitioner asserted this argument from the

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indefinite leave. *See García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d (1st Cir. 2000) 638, 648 ("An unvarying requirement for definiteness again departs from the need for individual factual evaluation."); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) ("Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation' under the ADA.").

beginning: "Defendant did not and could not have engaged in any meaningful interactive process to determine accommodations with Peyton by telephone while she lay in an altered mental state in a hospital bed." Record 92.

The brief further states this argument:

> The Plaintiff did not request an indefinite leave of absence. In fact, Peyton had not missed much work at all at the time she was terminated. She provided her employer with the only medical documentation she had in her possession on January 9, 2006. She was terminated before she could provide a more definite statement from her cancer physician.

Record 93.

Petitioner once again presented this argument in her appeal to the Eighth Circuit. In fact, that court mentioned Petitioner's altered mental state in its recitation of the facts: "she was under the influence of pain medication and had no recollection of any question or discussion pertaining to accommodation." Pet. at App. 4.

Peyton also maintained this argument in her brief to the Eighth Circuit. "Peyton was under the influence of pain medication . . . . Peyton does not recall any discussion of accommodation." Appellant's Br. at 8.

The single line Respondent refers to in the petition (Br. in Opp. 4) was merely a recitation of the facts consistent with the

arguments made in the lower courts, not a new standalone argument raised for the first time.

The fact remains that Fred's fired Peyton before she had any reasonable opportunity to discover what accommodation she needed and relay that information to the respondent.

* * * * *

For the foregoing reasons, and those mentioned in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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